Filed 4/20/10 P. v. Davis CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LAMONT DAVIS, Defendant and Appellant.	B210006 (Los Angeles County Super. Ct. No. GA061931)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed in part as modified; reversed in part.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Lamont Davis appeals from a judgment of conviction entered after a jury trial. The jury found him guilty of burglary (Pen. Code, § 459), two counts of sexual penetration by a foreign object (*id*., § 289, subd. (a)(1)), rape by force (*id*., § 261, subd. (a)(2)), false imprisonment (*id*., § 236), and making a criminal threat (*id*., § 422). The trial court found true the allegations defendant suffered five prior serious felony convictions (*id*., §§ 667, subds. (a), (b)-(i), 1170.12). It sentenced defendant to state prison for an indeterminate "Three Strikes" term of 150 years to life plus a determinate term of 30 years for the prior serious felony convictions.

On appeal, defendant claims evidentiary, instructional and sentencing error, as well as insufficient evidence to support his conviction of making a criminal threat. We agree there was sentencing error and modify the judgment accordingly. We also agree the evidence is insufficient to support his conviction of making a criminal threat and reverse as to that count. In all other respects, we affirm.

FACTS

A. *Prosecution*

1. Charged Crimes

K.V. lived alone in an apartment n Arcadia. She was separated from her husband, Eric. K.V. and Eric had two sons over whom they had lost custody; K.V.'s parents had custody of the boys.

Eric and defendant were musicians in a band together. In 2002 or 2003, while K.V. was living alone, defendant had phoned her a few times, asking to date her and telling her that he could take better care of her than Eric could. She told him she was not interested and asked him not to call her.

On May 17, 2004, defendant called K.V. and asked to come over to her apartment. She said she did not want him to come to her apartment. He then asked to take her to dinner at Denny's. She said she did not want to meet him anywhere. She told him she had to run errands and was thinking about buying a car. Defendant told her he knew she was looking for a car and could help her. K.V. declined his help and hung up the phone.

Defendant called again 45 minutes later. He told K.V. he was on the way to her apartment. She told him she did not want him to come over. He asked if Eric was there; K.V. said he was not.

As K.V. was getting ready to leave the apartment, she saw a hand moving aside the blinds on her front window; she kept the window open part way to allow her cat in and out. She told whoever it was to leave and went to lock her front door. Defendant pushed the door open. K.V. attempted to push it closed, but defendant pushed it open and came in, pushing K.V. back against a wall. K.V. told defendant to leave, but he refused.

Defendant grabbed at K.V.'s breasts and told her, "We can do it right here." Defendant dragged K.V. around the apartment by her arm and sometimes by her hair. As K.V. struggled to escape, defendant tried unsuccessfully to kiss her face, neck and breasts. He tried to put his hand down her pants and to pull her pants down, but K.V. struggled and prevented him from doing so.

Defendant pushed K.V. down on the bed; when she tried to get up, he pushed her back. He lay on top of her so that she could not move. Defendant took off his pants and pulled down K.V.'s pants and underwear. He then put his penis inside her vagina and had sexual intercourse with her. It was painful and she told him to stop, but he would not. When he was finished, he got up off of her. She again asked him to leave, but he did not. K.V. then tried to leave, but defendant grabbed her and pulled her back.

Defendant pulled K.V. into the bathroom, where he got a disposable razor. He took K.V. to the kitchen, where he put soap on his face. He then took K.V. back to the bathroom, where he shaved. He cut his face, cursed K.V., and used toilet paper to stop the bleeding.

While in the bathroom, defendant pushed K.V. against the sink. He pulled down her pants and put his finger, and later his penis, in her vagina. When he was done, he left.

Sometime later, defendant called K.V. and told her not to call the police. She felt threatened and afraid that defendant would come back and do something to her if she called the police.

K.V. changed her clothes and went to an appointment. She then went to her parents' house and told her mother what had happened. Her mother called the police. An officer came to the house and spoke to K.V. K.V. then went home and took a shower.

According to Elizabeth V., K.V.'s mother, K.V. called her on May 17 and said that a friend of her husband's had hurt her. She was crying and her voice was shaking. K.V. later came over to her mother's house to talk. She was nervous, scared and jumpy. At first, she would not talk about what happened, and she told her mother she would be hurt if she called the police. Later, she told her mother that a friend came by and forced his way into her apartment. It was not until sometime later that K.V. told her mother that the man raped her twice; once on the bed and once in the bathroom.

On May 18, K.V. showered again. She called the police. Arcadia Police Officer Robert Bartley went to K.V.'s apartment and spoke to her there. K.V. was "[u]pset. Visibly shaking. [She j]ust seemed to be very timid." She cried as she told him what had happened.

K.V. told Officer Bartley that defendant had called her several times asking to get together. Defendant later came over and entered through her door, which was unlocked. He grabbed her by the back of the head and touched her breasts. K.V. said that defendant got her on the bed, but she was able to escape briefly and no sexual activity occurred there. She said that defendant shaved using her razor and cut himself. She tried to escape, but he held her down against the bathroom sink and put his finger and his penis in her vagina.

Officer Bartley took K.V. to the San Gabriel Valley Medical Center. Patsy Sims (Sims), Director of the Sexual Assault Center, examined K.V. K.V. told Sims that defendant assaulted her in the bathroom, penetrating her vagina with his finger and his

penis. K.V. complained of breast tenderness and genital pain while urinating. During the examination, K.V. was anxious and tearful.

Sims found an abrasion above K.V.'s breast, two abrasions on her vagina and a tear to her hymen.[1] These injuries were consistent with consensual sex as well as forced sex. Sims found no evidence of injury to K.V.'s head or arms.

Officer Bartley contacted Eric to get defendant's address and telephone number. Eric refused to give him the information.

The police recovered a razor and a bloody shirt from K.V.'s apartment. DNA found on the items matched defendant's DNA. The rape kit containing fluids collected from K.V. and her home contained no evidence of semen.

On May 20, K.V. met with her insurance agent, Susie Vonderohe (Vonderohe) regarding a car insurance claim. Vonderohe noticed that K.V. seemed very distraught. K.V. told her "something about the window and how somebody was trying to get in through the window." K.V. said that the person who came into the apartment knew her ex-husband.

2. Prior Crimes

Lisa S. babysat for defendant and his wife almost 30 years earlier, when she was 15 years old. When she arrived to watch his 13-month old twins, defendant told her that his wife was at the store. He began to talk about masturbation. He then locked the door, put on some music and showed Lisa a book about masturbation. After that, he took off Lisa's shirt, took her into the bedroom and tied her to the bed. He took off the rest of Lisa's clothes and put his penis in her vagina. He did this a second time, and then he took her to the shower, where he again assaulted her twice. While she was still naked, he made her feed his twins. Before she left, he told her he would kill her if she told anyone about what he had done.

---

[1] Sims testified that women who have given birth could still have hymen tissue that could tear during intercourse.

Lisa's older sister, Elizabeth W., also baby sat for defendant and his wife. One night after babysitting, defendant was to drive her home. Instead, he drove to an industrial area. He told Elizabeth that he had "some issues at home" and needed to talk to her. He said that his wife "couldn't have sex" and "he was sexually frustrated." He rubbed her leg and pushed up her dress. She tried to stop him and threatened to scream, but he said no one would hear her. He pulled his pants down and masturbated while touching her vagina, eventually ejaculating on her. After that, she asked to go home, but he told her he would take her when he was ready. He started masturbating again, and Elizabeth tried to get out of the car. He told her that if she got out, he would run her over, and no one would see because it was a secluded area. When he finally took her home, he told her not to tell anyone because no one would believe her.

Both Lisa and Elizabeth eventually reported what defendant had done to them. Lisa testified in court about the incident with defendant.

Janet G. worked with defendant at the Crescenta Valley Medical Center about 27 years earlier. One day Janet went to lunch with defendant and he drove Janet back afterward. He suggested that they smoke a joint and talk for awhile; she agreed. While they were sitting in his car, he began to get physical. When she asked him to stop, he pushed her down and slapped her. He pulled her pants down and put his penis inside her vagina. He then forced her to orally copulate him. When he was done, he drove Janet back and suggested they have lunch again. Janet told her mother and later testified in court about the incident.

In 1990, when Nicole G. was 12 years old, she and another girl went to defendant's house to play with his children. When defendant was driving her home, he stopped and took her to the back seat of his car. He kissed her and put his tongue in her mouth. He rubbed her breast. He put his hand down her underwear, rubbed her vagina and put his finger inside. He then drove her home and told her not to tell his children. Before he let her out of the car, he had her kiss his penis. Nicole later reported the incident to school authorities and the police.

B. ***Defense***

Muha Haddad (Haddad) took care of K.V.'s sons at Elizabeth V.'s home for five or six years. She saw K.V. several times a month but tried to avoid her, because K.V. did not seem to like her and treated her poorly. Haddad did not think K.V. was believable, in that K.V. sometimes made false allegations and changed her story. Haddad thought K.V. was "just angry because [her mother] adopted the children." Haddad never heard K.V. talk to her mother about defendant.

Eric had heard K.V. express jealousy toward his friends, especially his fellow band members, about how much time he spent with them. He did not remember whether she had ever expressed jealously toward defendant. He had been at K.V.'s apartment with defendant on two or three prior occasions. When he later spoke to defendant, defendant denied raping K.V. Eric also said that because K.V. was bipolar, it was hard to take her out in public.

When Arcadia Police Detective Sandy Topel was investigating the case, Haddad asked to speak to her. Haddad said that K.V. lied about everything and could not be believed. K.V. had a history of falsely accusing Haddad. K.V. accused her mother and family of doing bad things to her. Haddad said she heard K.V. talk to her mother about the case and her story kept changing. Haddad acknowledged, however, that she did not know if K.V. was lying about this case.

Detective Topel also spoke to Eric. Eric said that K.V. was making up the accusations because she was jealous of the amount of time he spent with defendant.

DISCUSSION

A. *Exclusion of Evidence of K.V.'s Prior False Accusations of Rape and Other Evidence as to K.V.'s Credibility*

1. Trial Court Proceedings

Prior to trial, defendant filed a motion pursuant to Evidence Code sections 782 and 352[2] to determine the relevance and admissibility of evidence of K.V.'s prior sexual conduct. At the hearing on the motion, defense counsel explained to the court: "What I have here, the offers of proof are on very tangentially related to or on very lightly or potentially touch upon the complaining witness's sexual activity. I mean I can see where the issue might come up, and I am thinking particularly the offer of proof about her relationship with her estranged husband. She appears to give varying statements at the preliminary hearing about that relationship. [¶] But my understanding of [Evidence Code section] 782, it is intended to control and regulate the offers of proof going to prior I will say sexual indiscretion or promiscuous behavior and that part of the thing on the complaining witness. I just don't think we have that here."

The trial court noted that defendant's "offer of proof relates there in sum and substance to a statement that the alleged victim in this case apparently made at the preliminary hearing, that she hadn't had sexual relations with her former husband [from] whom she was estranged by some six months alleged in the case . . . . As I read the offer of proof, maybe there is other evidence out there in the world or something she might say in connection with cross examination that might somehow impeach her preliminary

---

[2] Evidence Code section 782 governs the admission of the sexual conduct of a complaining witness to attack the witness's credibility. Evidence Code section 352 gives the trial court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

hearing statement that she hadn't had sexual relations with her husband within about six months prior to the incident alleged in this case."

The court excluded the evidence under Evidence Code section 352, noting that its probative value would be substantially outweighed by the undue amount of time it would take to explore the matter and "the marital ups and downs of the alleged victim and [Eric]." Additionally, it might confuse the jury why they were taking so much time over the matter. The court added, however, that if Eric testified, it would be willing to revisit the matter.

The court indicated its ruling was the same with respect to evidence that K.V. testified falsely in litigation against Eric. "We can't go there pursuant to [Evidence Code section] 352. That would be a long winding road of who knows where. This is marriage of alleged victim in this case to her husband and all sorts of things. You have indicated paternity issues, domestic violence, marital issues, child custody. Again, this jury would be no doubt very confused should we go down that road." Again, however, the court was willing to reconsider its ruling if something came up during trial to which the proffered evidence was relevant and the defense made "a limited offer of proof." But it was not going to allow "an open ended inquiry into the prior marriage, grandparents have the kids issue."

The court then turned to proffered evidence that "the victim claims to have been raped on other occasions, her experience with sexual assault and investigation and her own experience in sexual matters, generally suggest[ing] she is aware of confirming valuable evidence of acts of a rape and to identify the perpetrator." The court found defendant's proffer of evidence was "way too vague. Not an arrest mentioned. Not a case is mentioned." The court would, however, allow the defense to question K.V. about her actions on May 17, 2004, why she delayed reporting the incident and why she did certain things.

Defendant also sought to introduce evidence that K.V. previously made a false accusation of rape against Ryan Orth (Orth). The prosecutor noted that the defense had not located Orth and did not have him under subpoena, so it was premature to discuss

admission of the evidence. The trial court agreed with the defense that if there was a false accusation of rape, it was relevant. It told defense counsel that "if you can package it properly, I think it would be admissible." It did not necessarily agree with the prosecutor that having Orth available to testify was necessary. However, the court added that they did "not need to have a trial within a trial about how many times this woman has been sexually violated."

Additionally, the court pointed out that the parties had known about Orth for a long time. "The defense has desperately wanted to locate him. Now they are trying to say K.V. has fabricated rape charges, that she cannot provide the evidence or the witnesses. I believe [it would be] inappropriate cross examination or examination of the witness to throw this out there and leav[e] the speculation hanging in front of the jury when they have no ability to provide any solid proof from their perspective this is not what she did because she did not procure the witness. [¶] Just like the People pursuant to [Evidence Code sections] 1101(a) and 1108 are required to get the evidence in. The defense should be held to the same burden."[3]

Defense counsel, after noting that "[t]he court is well on its way to excluding the defense from presenting to the jury the most available evidence of times when the complaining witness has apparently lied," requested that the court admonish the prosecutor not to discuss the defense's offer of proof in her opening statement. The court and prosecutor agreed that she would not discuss these matters.

The issue was raised again after K.V. began her testimony, "in connection with anticipated cross examination." The court had reports of a 1990 Missouri case and Rosemead/Upland case. It noted that courts do not generally read reports but hold

---

3 Evidence Code section 1101, subdivision (a), excludes evidence of a character trait to prove conduct. As an exception to this rule, Evidence Code section 1108 allows evidence of another sexual offense by the defendant. Prior to admission of this evidence, the People must "disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered." (*Id*., subd. (b).)

Evidence Code section 402 hearings to consider the admissibility of "disputed sensitive evidence." The prosecutor requested that the court hold a hearing rather than read the reports, explaining "[t]he People believe it is not proper evidence to read in court documents, police reports when the defense has no intention of calling any witnesses or been able to provide any witnesses to those issues." The court decided that, at that point in the proceedings, it would not make a blanket ruling as to admissibility of evidence as to credibility and false accusations but instead would address these issues as they arose during cross-examination. At the end of the day, they would discuss whether the court should read the reports; the following day, they would discuss Orth and the incidents reflected in the reports.

Later that afternoon, the court asked defense counsel whether he had any "live witnesses" with respect to the incidents in question. He responded, "with respect to the claimed child abuse in September of 1990 where [K.V.] apparently inaccurately accused her own father of beating her, he is a live witness. I would say that the very similar an[d] apparently inaccurate accusation against her father, that she made during the last couple of years, and has taken the position that her child was the victim and not herself. . . . [¶] The two incidents described in the Missouri package, in November of 1990. She is a witness in the course of dealing with respect to Ryan Orth. She is a witness to the incident dealing with respect to the two [men] in Pasadena."

The court reiterated the People's position that, without any witnesses other than K.V., it was inappropriate to question K.V. as to those incidents. Although it would make both sides unhappy, the court indicated it "might say there is not enough even pursuant to the good faith question rule to cross-examine the alleged victim regarding Ryan Orth, absent the witness, these two Missouri incidents in 1990, child abuse and so on and so forth from the Rosemead incident but, for example, if the father shows up, there is another issue we need to wrestle with within the next day or two. There are lots of different ways these matters can be handled. I am just trying to suggest some of the options the court has."

The following day, the court gave defense counsel another opportunity to make offers of proof regarding the incidents. Defense counsel stated that while K.V.'s father was not on the defense witness list, he was under subpoena. As to the Rosemead incident, it appeared that about 2002 or 2003 K.V. told officials and family members that two men sexually assaulted her in Pasadena or Rosemead. Both defendant and the People had sent investigators to locate an official report of the incident with no success.

As to the incident with Orth, defendant's offer of proof was "based on reports from the Upland Police Department" and "also a report from the Los Angeles County Sheriffs or another agency to which [K.V.] made her only complaint." K.V. "characterized [the incident] as in the nature of a date rape." Orth was interviewed and told law enforcement he and K.V. had consensual sex. No charges were filed.

Defense counsel argued that "[t]he relevance of the Ryan Orth incident is analogous to or very similar to the relevance that I contend exists with respect to the two complaints against her own father, the musician social context rape allegation, the case before you and the domestic violence allegations she made with respect to her husband. The sexually inappropriate touching allegations she made with respect to her husband and even the Rosemead case. [¶] I guess what I am saying is that there are three avenues of proof that I would like the jury to listen to testimony about."

When asked about the Missouri incidents, defense counsel explained that when K.V. was 13, she told "a child welfare official and police that her father had brutalized her in the course of some sort of a dispute about her conduct in the house, arousing her out of bed and moving her from one room to another." The complaint was investigated and determined to be unfounded.

The trial court noted that second incident occurred when K.V. was almost 16. She claimed she was raped by a 16-year-old boy who visited her when her parents were out of the house. There was evidence of sexual activity; sperm was found on her bedding although none was found in her vagina. The incident was investigated but not prosecuted.

Defense counsel argued that K.V., "having made a series of sexual assault reports and complaints over the last . . . 17 years of her life, having litigated at least one, perhaps two of those including this one, she has to be familiar with the importance of evidence preservation and particularly chemical body fluids, forensic tests that are scientific evidence, preservation. We know she had her first experience with that in Missouri in 1993 . . . [b]ecause we have reports that a rape kit was taken. Bedding and other fabric were tested. Sperm was found and, of course, she had to have known that, that procedure exists."

Additionally, counsel argued, both the Orth case and the instant one involved a delay in reporting. "One suspects that the experience that she had with her complaints touching on the alleged inappropriate conduct of her husband towards the babies, that would have illuminated the same procedure or manner of proceeding which law enforcement normally employs in situations like this. And yet when she has been as she says raped by a person who we offer to prove who she knew was a sexual offender, and a person she knew was coming for her, she postpones reporting and delays repeatedly such physical evidence such as getting around to the rape kit being taken, a procedure which she is familiar [with] is not available. There is no physical evidence to preserve.

"Now I think that her delay in reporting is something that the jury needs to hear about. . . . The understanding about it should be illuminated by the prior experience of the alleged victim . . . . That is the forensic evidence preservation motion."

As to the prior false claims of rape, counsel argued the incident with Orth was such a false claim. K.V. was a witness to the events, could testify as to what happened, and defense counsel could "ask her whether she reported that incident truthfully and the jury can watch her demeanor and determine whether that claim was accurately described by her. [¶] The same is true of this claim and I think the same is true of the alleged Missouri rape claim. The defense theory is that she lied on those occasions and that she is lying now. The similarity of the matter, lied about, we contend and the fact that it occurs in what seems to be a pattern of three events is something which I think the jury should be entitled to hear."

Defense counsel also believed he should be able to ask K.V. about her claims that Eric used domestic violence against her and touched their children inappropriately, as well as her unfounded claims that her father abused her. He believed "the jury should be permitted to contrast testimony from those individuals who I offer to prove will say that she lied about them on all five occasions or lied with respect to the conduct described on one or more of those occasions[.]" That is, Eric and K.V.'s father would testify they did not do what she accused them of.

In response, the prosecutor pointed out that there was no evidence K.V. lied as to the other incidents; the fact the alleged perpetrators denied it did not mean that the conduct did not occur. It just meant that the charging authority did not believe there was sufficient evidence to prove the case. The defense was not offering "live evidence" that K.V. was not raped or evidence of a case against her for filing false reports. "The query for the court will be how can the defense have good faith questions when he has, in fact, no evidence to support the good faith questions. He has attempted to raise suspicion in front of the jury, circumvent the issue and gross impeachment."

The prosecutor did not think there was much probative value to K.V. having lied as a teenager. She also did not think it necessary to relitigate the child abuse allegations against Eric that were adjudicated in the dependency case as to his and K.V.'s children. Additionally, the prosecutor pointed out that Eric had admitted domestic violence against K.V.

The trial court then ruled as to the Rosemead/Upland incident, it was excluding any questioning because there was no "live testimony to establish" what occurred, and "whatever probative value that might have is substantially outweighed by the probability its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, or confuse the issues."

The court made the same ruling as to the incident with Orth. It noted that the incident possibly involved date rape, and "[i]nsufficient evidence to file criminal charges does not equate to a false accusation." The court added that if Orth's presence at trial could be obtained, the court would reconsider its ruling.

The court also excluded evidence of the Missouri incidents on the ground any probative value that might have "is substantially outweighed by the probability that its admission would necessitate undue consumption of time, create substantial danger of undue prejudice and confuse or mislead the jury." The court believed that "to delve into an incident involving a teenager 20 years ago, certainly might confuse the jury regarding what they are attempting to do during this trial which is to address the allegations of May 17th, 2004." It did not "believe there is an adequate factual predicate" to examine K.V. as to the incidents, and it would be "unfair under the circumstances to put the alleged victim through cross examination regarding that incident." The court again added that if K.V.'s father became available to testify, it would reconsider its ruling as to the Missouri incidents.

2. Discussion

Defendant contends the trial court's rulings which prevented him from challenging K.V.'s credibility deprived him of his constitutional right of confrontation. For the reasons set forth below, we disagree.

A defendant's constitutional right to confront witnesses against him includes the right to examine witnesses on questions of bias and credibility. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385-1386.) Nonetheless, the trial court "retains broad discretion over the conduct of trial." (*Id*. at p. 1385.) It may impose reasonable limits on a defendant's examination of prosecution witnesses "'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citations.]" (*Id*. at pp. 1385-1386; accord, *People v. Ayala* (2000) 23 Cal.4th 225, 301.) The trial court's limitation of a defendant's examination of defense witnesses "does not implicate or infringe a defendant's federal constitutional right to confront the witnesses against him, unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness's credibility. [Citations.]" (*In re Ryan N., supra,* at p. 1386; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

Evidence that a victim of a sexual assault made prior false accusations of sexual assault is relevant and admissible on the question of the victim's credibility. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1457.) However, "[t]he value of the evidence as impeachment depends upon proof that the prior charges were false." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097; *Tidwell, supra*, at p. 1457.) Where, as here, there is no independent proof of the falsity of the charges, admission of the evidence "would in effect force the parties to present evidence concerning . . . long-past sexual incidents which never reached the point of formal charges. Such a proceeding would consume considerable time, and divert the attention of the jury from the case at hand." (*Bittaker, supra*, at p. 1097; *Tidwell, supra*, at p. 1458.)

Evidence Code section 352 (section 352) gives the trial court the discretion to exclude evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) While a defendant has the right to present evidence relevant to the theory of his defense, this right "does not require 'the court [to] allow an unlimited inquiry into collateral matters.'" (*People v. Ayala, supra*, 23 Cal.4th at p. 282.) The proffered evidence must be of more than slight or limited probative value. (*Ibid.*) Trial courts do not abuse their discretion under section 352 in excluding evidence marginally relevant for impeachment purposes in order "'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral . . . issues.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 946.)

In the absence of any independent evidence that K.V. made false accusations of sexual assault or other crimes, we conclude the trial court did not abuse its discretion in excluding evidence of those accusations under section 352. (*People v. Bittaker, supra*, 48 Cal.3d at p. 1097; *People v. Tidwell, supra*, 163 Cal.App.4th at p. 1458.)

Additionally, defendant was able to cast doubt on K.V.'s credibility; he pointed out the discrepancies in the statements she gave different people about what occurred as well as the discrepancies between these statements and her preliminary hearing and trial testimony. Defendant was able to establish that K.V. was aware of the need for an

examination to preserve DNA evidence yet went home and took a shower before making a police report and going to the hospital for an examination. Defendant presented a witness, Haddad, as to K.V.'s lack of credibility. He also presented a witness, Eric, as to K.V.'s motive for lying.

We do not believe that allowing defendant to cross-examine K.V. about her prior allegations of sexual and other misconduct, *which defendant could not prove were false*, "might reasonably have produced a significantly different impression of [her] credibility." (*In re Ryan N., supra*, 92 Cal.App.4th at p. 1386; accord, *People v. Quartermain, supra*, 16 Cal.4th at pp. 623-624.) Accordingly, there was no violation of defendant's right to confrontation.

B. *Evidence of Prior Sexual Offenses*

Defendant contends the trial court erred in admitting evidence of the prior sexual offenses, in that they were not similar to the charged offenses, remote in time and prejudicial. We disagree.

Evidence Code section 1101, subdivision (a), prohibits, with specified exceptions, admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Evidence Code section 1108, subdivision (a) (section 1108), provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."[4]

---

[4] Defendant acknowledges that the California Supreme Court has upheld Evidence Code section 1108 as constitutional (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-918; see *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395), and we are bound by its decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). He nevertheless asserts the unconstitutionality of the statute in order to preserve the issue for federal review.

Section 1108 was enacted "'to expand the admissibility of disposition or propensity evidence in sex offense cases.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 502, quoting from *People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.) When deciding whether to admit evidence of a prior sexual offense, the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, at p. 917; accord, *Abilez*, *supra*, at p. 502.)

Defendant first contends that the record fails to show that the trial court considered the degree of certainty that defendant committed the prior offenses, in that some of the witnesses did not know whether defendant was convicted and sentenced for the offenses against them. He cites no authority for the proposition that there must have been a conviction and sentence for a prior offense *and* that the witness must have been aware of it. The record reflects that defendant was convicted of sexual assaults on the witnesses who testified. Certainty therefore was not an issue.

Defendant next asserts that the lack of similarity between the prior offenses and the current ones should have precluded admission of the evidence. We disagree. In each case, defendant sexually assaulted a woman whom he knew. That Lisa S., Elizabeth W. and Nicole G. were minors at the time defendant assaulted them does not require a finding of dissimilarity. At the time defendant assaulted Lisa and Elizabeth, they were teenagers and he was in his twenties. Although Nicole was younger, defendant did not attempt intercourse with her. That the differences between the offenses might have justified exclusion of the prior offenses (see, e.g., *People v. Abilez*, *supra*, 41 Cal.4th at p. 502), does not render it an abuse of discretion to have admitted them.

Defendant also claims the evidence should have been excluded under section 352 as likely to confuse the issues and consume an undue amount of time. We disagree.

Unlike the question of K.V.'s previous false accusations of sexual assault, proof of defendant's prior sexual assaults would not require a "mini-trial" as to the existence of the prior sexual assaults. (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1097; *People v. Tidwell*, *supra*, 163 Cal.App.4th at p. 1458.)

Defendant further asserts that the prior offenses should have been excluded as being too remote in time to have much probative value. To the contrary, "'[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]'" (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900.) Sexual offenses occurring as long as 23 and 30 years prior to the charged offenses have been held not to be "too old to show propensity" and thus inadmissible. (*Ibid.*) Moreover, substantial similarity between the prior uncharged offenses and the charged offenses "'balance[s] out the remoteness of the prior offenses. [Citation.]'" (*Ibid.*; *People v. Waples*, *supra*, 79 Cal.App.4th at p. 1395.)

Finally, defendant claims the trial court failed to fulfill its responsibilities under section 352 to weigh the probative value of the prior offenses against their prejudicial effect. Defendant acknowledges that the trial court is not required to state expressly that it has weighed probative value against prejudicial effect. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.) He also points to nothing specific in the record suggesting that the trial court failed to do so. Moreover, in light of the trial court's limitation of the number of witnesses to testify and willingness to exclude testimony of a particularly inflammatory nature, it is clear the trial court understood and exercised its responsibility to weigh probative value against prejudicial effect.

C. *Sufficiency of the Evidence of Making a Criminal Threat*

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond

a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

A person is guilty of making a criminal threat if (1) he "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person"; (2) he made the threat "with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out"; (3) the threat was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat"; (4) the threat caused the person threatened "to be in sustained fear for his or her own safety . . ."; and (5) the fear was reasonable under the circumstances. (Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

We agree the evidence was insufficient to support defendant's conviction of making a criminal threat. K.V. testified that defendant called her after the incident. She could not remember defendant's "exact words," only that defendant told her not to call the police. She felt threatened by the call.

While K.V. felt threatened by the call, that is not enough to prove the crime of making a criminal threat. There was no evidence of what defendant said from which it can be determined that he threatened a crime which would result in great bodily injury or death, that the threat was unequivocal, unconditional and immediate, or that K.V.'s fear was reasonable under the circumstances. The determination as to whether defendant

made a criminal threat is based not only on the circumstances and the victim's response but also on the words used. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 754.) Accordingly, defendant's conviction must be reversed.

D. *Testimony as to Results of DNA Testing*

Kari Woshida (Woshida), a senior criminalist with the Los Angeles County Sheriff's Department, testified that the DNA profiling in this case was done by senior criminalist Glenn Lamas (Lamas). Woshida was the technical reviewer of his work; she did not see the items tested or the testing itself, only the results. Defendant objected to Woshida testifying as to the results of the testing, since she did not have personal knowledge of the testing. The trial court overruled the objection.

Defendant contends Woshida's testimony should have been excluded, in that the report on which she based her testimony contained testimonial hearsay and its preparer was not subject to cross-examination. It therefore violated the Confrontation Clause and was inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].

In *Crawford*, the United States Supreme Court held that the Confrontation Clause applies where testimonial hearsay is involved; where nontestimonial hearsay is at issue, state hearsay laws apply. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68; *People v. Cooper* (2007) 148 Cal.App.4th 731, 740-741.) While not defining testimonial hearsay, the court indicated that it includes statements "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford*, *supra*, at p. 52.)

In *People v. Geier* (2007) 41 Cal.4th 555, the California Supreme Court addressed the admissibility of an expert's testimony as to the results of DNA testing performed by another person in light of *Crawford*. The court concluded that "the kind of scientific evidence at issue in this case . . . is not testimonial . . . . For our purposes in this case, involving admission of a DNA report, what we extract from [*Crawford* and the United States Supreme Court's subsequent opinion in *Davis v. Washington* (2006) 547 U.S. 813

[126 S.Ct. 2266, 165 L.Ed.2d 224]] is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier*, *supra*, at p. 605.)

The court concluded the DNA report was not testimonial within the meaning of *Crawford* and therefore admissible. (*People v. Geier*, *supra*, 41 Cal.4th at p. 607.) It was made as part of "'a routine, non-adversarial process meant to ensure accurate analysis,'" rather than as part of the accusatory process. (*Id*. at p. 602.) The expert's reliance on the report therefore did not violate the Confrontation Clause. (*Id*. at p. 594.)

In *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314], recently decided by the United States Supreme Court, the trial court admitted "certificates of analysis," showing only that a substance in the defendant's possession contained cocaine. The defendant challenged the admission of the evidence, citing *Crawford*. (*Id*. at p. ___ [129 S.Ct. at p. 2531].)

The court concluded that the documents fell "within the 'core class of testimonial statements'" subject to the Confrontation Clause under *Crawford*. (*Melendez-Diaz v. Massachusetts*, *supra*, ___ U.S. at p. ___ [129 S.Ct. at p. 2532].) They were in effect affidavits, made for the purpose of proving in court the nature of the substance in the defendant's possession. (*Ibid*.) Confrontation through cross-examination was necessary to ensure the accuracy of the analysis. (*Id*. at p. ___ [129 S.Ct. at pp. 2536-2538].)

Here, by contrast, Woshida testified as to the DNA testing procedures used and the safeguards, and her technical review of Lamas's work to make sure there were no errors and that his analysis was correct and her review of the results. She explained how the testing worked, the results and the significance of those results. She was available for cross-examination as to her testimony. Thus, unlike the situation in *Melendez-Diaz*, defendant had the opportunity for cross-examination to ensure the accuracy of evidence admitted.

Due to the differences between this case and *Melendez-Diaz*, we reject defendant's suggestion that *Geier* was wrongly decided. In any event, we are bound by our Supreme

Court's decision. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.) Thus, we conclude the trial court did not err in overruling defendant's objection to Woshida's testimony.[5]

E. *Impeachment of Lisa S.*

Prior to trial, the prosecutor provided the court with the criminal histories of its witnesses. After reviewing them, the court "determined that there are two felony convictions that would be disclosed to the defense for one of the People's witnesses, Lisa [S.] And there were in fact, as to that particular witness, there were other arguably [misdemeanor] convictions of moral turpitude that will not be disclosed." The reason for the nondisclosure was that the convictions were "remote in time."

Thereafter, defense counsel asked about picking up the information as to the prior convictions from the court clerk. The court responded, "Well, what I was going to ask of the People is just to provide that information to the defense, as to those two convictions, so as not to provide the entire rap sheet. [¶] So I'll leave that to [the prosecutor] to provide you with that." The prosecutor asked, "Your honor, just so that I'm clear, are we talking about 1998 and 2004?" The court responded that they were.

---

5 We note that the United States Supreme Court denied review in *Geier* four days after its decision in *Melendez-Diaz*. (*People v. Geier, supra,* 41 Cal.4th 555, cert. den. *sub nom. Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856, 174 L.Ed.2d 600].) The issue is now back before the California Supreme Court in *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213 [*Geier* survives and is distinguishable from *Melendez-Diaz*]; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620 [*Geier* survives and is distinguishable from *Melendez-Diaz*]; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886 [expert's testimony based on another expert's report inadmissible under *Melendez-Diaz*]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted December 2, 2009, S177046 [*Geier* disapproved by *Melendez-Diaz*]. We anticipate petitions for review as well in two recent cases: *People v. Benitez* (2010) 182 Cal.App.4th 194 [*Geier* does not survive *Melendez-Diaz*] and *People v. Bowman* (2010) 182 Cal.App.4th 1616 [*Melendez-Diaz* does not abrogate *Geier*].

The trial court has broad discretion to admit or exclude evidence of acts of dishonesty or moral turpitude relevant to impeachment under article I, section 28, subdivision (d) of the California Constitution. (*People v. Wheeler* (1992) 4 Cal.4th 284, 293; *People v. Castro* (1985) 38 Cal.3d 301, 312-313.) Evidence of a witness's misconduct involving moral turpitude which results in a misdemeanor conviction is admissible for impeachment purposes. (*Wheeler*, *supra*, at pp. 295, 297.) Such misconduct may suggest a willingness to lie and thus is relevant to the witness's credibility. (*Id*. at pp. 295-296.) However, misconduct not amounting to a felony generally is less probative of dishonesty than felony convictions. (*Id*. at p. 296.) Therefore, the trial court should exercise particular care in determining whether to admit such evidence. (*Id*. at pp. 296-297.)

Defendant argues that misdemeanor convictions from 1998 and 2004 are not too remote to be relevant and admissible. However, as the People point out, it was the felony convictions from those years that were disclosed to be used for impeachment purposes.

Lisa S.'s rap sheet, which was provided to us in the superior court file, appears to reflect misdemeanor convictions from 1988 through 1998. We need not decide if the trial court abused its discretion in determining them to be too remote in time to be admissible. Even if there was error, it was harmless. Two felony convictions were disclosed to the defense, and they could be used to impeach Lisa. Excluding the misdemeanors for impeachment purposes would not give Lisa "a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453.)

Additionally, after Lisa S. and Elizabeth W. testified, defense counsel informed the court that he had "neglected to ask" Lisa about her prior burglary conviction when she was testifying. He suggested that the prosecutor stipulate to that fact or that Lisa be asked back to court. The prosecutor declined to stipulate to the prior conviction. She added, "To be honest, I do not know in light of the nature of the testimony, i[t] would have been that big of a deal regardless. I prepared my information. The information was turned over and I feel [defense counsel] made an oversight, but I am not in a position to

correct that oversight." Defendant contends his counsel's failure to impeach Lisa with her prior convictions deprived him of the effective assistance of counsel.

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) """The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."""" (*In re Cudjo*, *supra*, at p. 687; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

Assuming defense counsel's failure to impeach Lisa S. with her prior convictions fell below an objective standard of reasonableness, it did not meet the standard of prejudice required to reverse defendant's conviction for ineffective assistance of counsel. Lisa was only one of four witnesses who testified as to prior sexual assaults by defendant. In light of the testimony of the other three witnesses, it is not reasonably probable that the jury would have completely discredited Lisa *and* acquitted defendant had Lisa been impeached with her prior convictions. Consequently, reversal for ineffective assistance of counsel is not required. (*In re Cudjo*, *supra*, 20 Cal.4th at p. 687.)

F. *CALCRIM No. 318*

Defendant contends that CALCRIM No. 318 unfairly and improperly lessened the People's burden of proof, in that it "created an improper presumption that a witness's unsworn out-of-court statements are both true and deserving of greater belief than statements made in court under penalty of perjury."[6] We disagree.

---

6 CALCRIM No. 318 provides: "You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those)

CALCRIM No. 318 instructs the jury that it *may* use the out-of-court statements in assessing the credibility of a witness's in-court testimony, and it *may* use the statements as evidence of the truth of those statements. No presumption is created.

Additionally, the jury was instructed pursuant to CALCRIM No. 220 that in deciding whether the People proved their case beyond a reasonable doubt, the jury "must impartially compare and consider all the evidence that was received throughout the entire trial." The jury was further instructed pursuant to CALCRIM No. 105 that among the factors the jury could consider in evaluating a witness's credibility was, "Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?" We presume that the jurors were "able to correlate, follow, and understand the court's instructions." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190.)

Defendant acknowledges that his contention was rejected in *People v. Hudson* (2009) 175 Cal.App.4th 1025, review denied October 28, 2009. Defendant suggests that *Hudson* was wrongly decided. We disagree and reject his contention.

G. *Penal Code Section 654*

Defendant contends the trial court erred in failing to stay his sentences for burglary and false imprisonment pursuant to Penal Code section 654 (section 654), in that both crimes were committed as part of an indivisible course of conduct with the single objective of committing the sexual assaults. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The People counter that Penal Code section 667.6 (section 667.6) creates an exception to the rule of section 654, applicable here, relying on *People v. Hicks* (1993) 6 Cal.4th 784.

Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

---

statement[s], you may use (that/those) statement[s] in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in (that/those) earlier statement[s] is true."

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." (Subd. (a).) The section protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]" (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid*.)

In *People v. Hicks*, *supra*, 6 Cal.4th 784, defendant entered the victim's place of business, where he raped and sodomized her multiple times. He was convicted of burglary in addition to multiple forcible sex offenses. He contended that section 654 prohibited imposition of a separate term for the burglary, which was incidental to the forcible sex offenses. (*Id*. at p. 788.) The question before the court was "whether section 654 prohibits such multiple punishment when a trial court imposes consecutive full-term sentences . . . under the authority of section 667.6, subdivision (c)." (*Id*. at p. 789.)

The court concluded that "section 667.6, subdivision (c), created an exception to section 654 so as to permit the imposition of consecutive full-term sentences for enumerated offenses constituting separate acts committed during an 'indivisible' or 'single' transaction." (*People v. Hicks*, *supra*, 6 Cal.4th at p. 787.) Thus, defendant

could be sentenced for both the burglary and the sex offenses "notwithstanding section 654's general proscription against multiple punishment for offenses committed during an indivisible course of conduct." (*Hicks*, *supra*, at p. 797.)

Section 667.6 thus permits sentencing for both the burglary and the sexual offenses here, notwithstanding the fact that they were committed as part of a single transaction. (*People v. Hicks*, *supra*, 6 Cal.4th at p. 787.) The same does not hold true for defendant's convictions of burglary and false imprisonment. They were part of a single transaction for which only one sentence could be imposed under section 654. (*People v. Sipult* (1965) 234 Cal.App.2d 862, 870; see also *People v. Turner* (1995) 40 Cal.App.4th 733, 738.) Sentence for the false imprisonment thus must be stayed. (*Sipult*, *supra*, at p. 870.)

H. *Presentence Custody Credit*

Defendant contends, and the People agree, that he is entitled to credit for an additional 13 days of actual presentence custody credit, for a total of 1114 days, and an additional day of local conduct credit, for a total of 167 days. This would give him a total of 1281 days of credit. The abstract of judgment must be corrected to reflect this amount. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

DISPOSITION

The judgment is reversed as to count 5, making a criminal threat. As to the remaining counts, the judgment is modified to stay the sentence on count 4, false imprisonment, pursuant to section 654. As so modified, the judgment is affirmed. The clerk of the court is directed to prepare a corrected abstract of judgment to reflect the reversal of count 5, the stay of sentence on count 4, and the additional 14 days of presentence custody credit, and to forward a copy to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.